

FILED '05 JUL 26 08:21 USTC-ORP

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

UNITED STATES OF AMERICA,)	No. CR 05-CR-244
)	
Plaintiff,)	
v.)	
)	<u>PLEA AGREEMENT</u>
TFI NORTHWEST, INC.,)	
)	33 U.S.C. §§407 and 411
Defendant.)	

The United States of America, by Karin J. Immergut, through Assistant United States Attorney Dwight C. Holton enters into the following plea agreement with defendant TFI Northwest, Inc. ("TFNI") (also the "defendant"), by and through, and approved by its Oregon attorneys Robert C. Weaver, Jr. and Samuel C. Kauffman, hereby enter into the following Agreement, pursuant to Federal Rule of Criminal Procedure 11.

1. **Introduction:** In recognition of the defendant's cooperation with this investigation, its consent agreement with the United States Fish and Wildlife Service in which TFNI agrees to fund the remediation projects described in Attachments A and B, its repayment to the Oregon Department of Environmental Quality ("DEQ") for costs associated with the charged offense, and its efforts to resolve this matter promptly, the United States joins the defendant in entering the following agreement:

2. **The Charges:** TFNI controlled a facility located on Foster Avenue in Portland, Oregon, from which refuse matter, to wit: water treatment chemicals, were discharged and deposited into Johnson Creek, a navigable water of the United States, without a permit, in violation of Title 33, United States Code, Sections 407 and 411.

3. **Elements of the Offense:** The government must prove that the defendant TFNI, controlled a facility from which refuse of any kind was discharged and deposited

into a navigable water of the United States from the shore of the navigable water or from a manufacturing establishment located along the navigable water.

4. **Penalties:** TFNI has been advised of the maximum and minimum penalties, fines and assessments pursuant to 33 USC §411 and 18 USC §§3013; 3571(c)(5), (d); 3551(c); 3561 (c); and 3583(b), (e). See, Appendix 1.

5. **Sentencing Agreement:** Pursuant to Federal Rule of Criminal Procedure 11(c)(1)(B), the Office of the United States Attorney for the District of Oregon and the defendant TFNI agree to recommend that the Court impose the following sentence:

a. **Fine:** TFNI shall pay a fine in the total amount of \$200,000.

Payment of the fine shall be made prior to or at the time of sentencing.

b. **Right of Entry and Search:** For a period of eighteen (18) months from the date of this agreement, the Environmental Protection Agency and representatives from state and local environmental agencies shall have the right to enter and search the TFNI industrial facility located at 6400 SE 101st Avenue, Portland, Oregon, without prior notice and without cause. Such entries shall be conducted between 8:00 a.m. and 5:00 p.m. and shall not unreasonably interrupt TFNI's operations.

c. **Community Service:** As noted above, the parties agree that the defendant shall pay a total fine amount of \$200,000. The United States will petition the Court at the time of sentencing to order TFNI to pay one-half of the total fine amount, \$100,000, in community service pursuant to USSG § 8B1.3 and in furtherance of the sentencing principles provided in 18 U.S.C. § 3553(a), for the purpose of funding projects for the benefit, preservation, and restoration of the environment and ecosystems in the waters of the United States. Specifically, the United States will petition the Court to have TFNI deposit the community service payment into the Oregon Governor's Fund

for the Environment, a sustained granting fund established to benefit the coastal areas and rivers and streams passing through the District of Oregon. TFNI shall support the government's petition. The Oregon Governor's Fund for the Environment is administered by the National Fish & Wildlife Foundation, a charitable and nonprofit corporation established pursuant to 16 U.S.C. §§ 3701-3709. The community service ordered in this case shall be used by the Governor's Fund for the Environment to augment its distribution in its next round of grants. Because the community service payments are designated as community service by an organization, defendant further agrees that it will not seek any reduction in their tax obligations as a result of these community service payments. In addition, since these payments constitute community service, defendant will not characterize, publicize or refer to these community service payments as voluntary donations or contributions.

6. **Non-Prosecution of Any Other Offenses:** By this agreement, the United States Attorney's Office for the District of Oregon agrees that it will not undertake to prosecute TFNI or Thermo Fluids, Inc. for any alleged criminal offenses known to the government at the time of signing this agreement, including other potential violations of Title 33, United States Code, Sections 407 and 1311, and Title 42, United States Code, Section 6928. TFNI understands and agrees that neither this paragraph nor this agreement limits the authority of any U.S. Attorneys of other judicial districts, or any other federal, state or local regulatory or prosecuting authorities.

7. **Corporate Authorization:** TFNI will provide to the United States written evidence in the form of a notarized resolution of the Board of Directors of TFNI with appropriate seals, certifying that defendant is authorized to enter into and comply with all provisions of this agreement. The resolution shall further certify that the

President of TFNI and his designees are authorized to take these actions and that all corporate formalities, including, but not limited to, approval by TFNI directors-required for such authorization have been observed. TFNI agrees that it has authorized to the President of TFNI and his designees to appear on the behalf of defendant in the District of Oregon.

8. **Express Waiver of Right to Appeal Guilty Plea and Sentence:** TFNI agrees that if the Court imposes the sentence recommended by the parties under this agreement, it waives its right to appeal its plea and the sentence, and waives its right to collaterally attack the conviction and sentence.

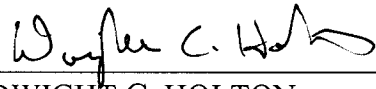
9. **Global Agreement:** This agreement is contingent on TFNI, having entered into an agreement with the United States Fish and Wildlife Service to undertake the remediation projects described in Attachments A and B and making payment pursuant to that agreement prior to or at the time of sentencing. This agreement is further conditioned on an agreement from the State of Oregon, through the DEQ and the Oregon Department of Fish and Wildlife ("DFW"), to forego any criminal, civil or regulatory prosecution or enforcement action against TFNI, its parent companies or any associated companies based upon the violation of Oregon statutes or regulations prior to the date of this agreement and known to DEQ or DFW.

10. **Completeness of Agreement:** The parties agree that this plea agreement is the only agreement between the United States Attorney's Office for the District of Oregon and TFNI concerning this matter. This plea agreement supersedes all prior understandings, if any, whether written or oral, and cannot be modified other than in a writing that is signed by all parties. No other promises or inducements have been or will

be made to the defendant by the parties to this agreement in connection with this case,
nor have any predictions or threats been made in connection with this plea.

DATED this 2nd day of May, 2005.

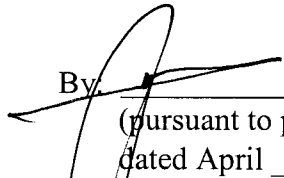
KARIN J. IMMERGUT
United States Attorney
District of Oregon



DWIGHT C. HOLTON
Assistant United States Attorney

7/25/05
Date

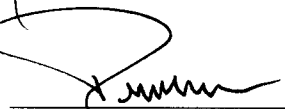
Thermo Fluids Inc.

By 

(pursuant to power of attorney
dated April __, 2005)

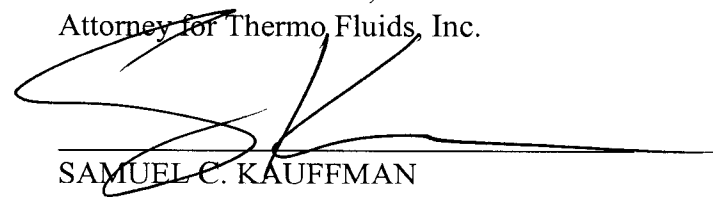
7.25.05
Date

APPROVED:



ROBERT C. WEAVER, JR.
Attorney for Thermo Fluids, Inc.

7-25-05
Date



SAMUEL C. KAUFFMAN
Attorney for Thermo Fluids, Inc.

7/25/05
Date

ADDENDUM TO PLEA AGREEMENT

UNITED STATES OF AMERICA v. TFI NORTHWEST, INC.

The maximum and minimal penalties, fines and assessments are as follows:

- a. Maximum term of imprisonment: N/A
33 U.S.C. §411.
- b. Minimum term of imprisonment: N/A
33 U.S.C. §411.
- c. Maximum supervised release term:
(18 U.S.C. §§ 3583 (b), (e)).
- d. Maximum probation term: 5 years.
(18 USC §§ 3551(c); 3561(c)).
- e. Maximum fine: \$200,000, or twice the gain or loss from the offense.
(18 U.S.C. §§ 3571(c)(5), (d)).
- f. \$125 special assessment.
(18 U.S.C. § 3013)

Environmental Education Support Proposal Watershed of 10,000 Stewards

Prepared by
**Michelle Bussard, Executive Director
Johnson Creek Watershed Council**

Prepared for
Oregon Department of Fish and Wildlife

and

U.S. Fish and Wildlife Service

Presented to
**William G. Newton, President
Thermo Fluids, Inc.**

April 22, 2004

Attachment A

Background/Orientation

The Johnson Creek Watershed Council's Environmental Education and Outreach Program (EEOP) is accomplished through Board, staff, volunteer, community, educator and student participation. The multi-layered initiative has been created to provide hands-on programs for K-12 students, and other life-long learners, to gain knowledge about the history and ecology of the watershed. The EEOP is based in the creek-side offices of the Johnson Creek Watershed Council but is primarily carried out in other locations throughout the watershed: schools, parks, and core habitat areas. Although our primary audiences are school-age children, life-long learners and the 170,000+ residents throughout the watershed are also engaged through interpretive signage, our Watershed Wide Event, Snap-Shot Monitoring Day, JC 101, and Restoration Work Party days. All elements and services of the EEOP, whether offered through the schools or other venues are provided **free of charge**.

The proposed project, described below, is on going and builds on the foundations established, expands outreach capacity, encourages increased public involvement and provides the means to consistently address public concerns about the creek not only in the Lents area, the site of the Thermo Fluids spill, but along the creek's entire 26 mile run. The basis for this proposal is the Council's Watershed Action Plan and Strategic Plans. The proposed project will enable the JCWC to work more effectively and directly with the impacted communities and especially the Lents neighborhood.

Key Goals of the Project

- ✱ **Expanded effort to inspire and facilitate community awareness and investment by developing and hosting watershed wide events**
- ✱ **Annually monitor, report, and publicize stream health and issue annual status report.**
- ✱ **Increase educational signage along the Springwater Corridor.**
- ✱ **Expand public awareness and education campaign about Johnson Creek and provide a variety of educational opportunities to support and further the campaign.**

Proposed Project: Watershed of 10,000 Stewards -- From Assessment to Action

Residents and students of this watershed connect to its natural resources, functions and assets in three ways: 1) through the science of the creek itself - its habitat, hydrology, biology, and flow; 2) through watershed restoration work parties that focus on invasive and debris removal, native species plantings, and long-term design and re-development of key sites to restore function and support fish and wildlife habitat; and, 3) through its stories and sense of place. The proposed project combines the Council's long-term commitment to environmental education and restoration with leadership, key message development and community participation.

Watershed of 10,000 Stewards will focus on increasing student and public participation, actively partnering and honing message development and delivery in order to inspire more informed, long-term and consistent stewardship of Johnson Creek. Projects that will be expanded upon using the funds requested from Thermo Fluids are described below.

**Teachable Moments: Classroom Hands-on and Field Work in the Watershed* – The primary goal of “teachable moments” is to increase awareness and understanding of: what a watershed is and how its natural systems work; the consequences of pollution and human impacts on the watershed; the role of indicator species such as salmonids; the importance of native plants; and practices to protect and enhance the watershed. In 2003-04, JCWC staff engaged over 1500 students from elementary, middle and high schools in an educational program with an additional 2000 community volunteers also participating through other educational events. Because of current funding cutbacks for schools, this program is only possible through the financial support and assistance of organizations like the Johnson Creek Watershed Council. The major obstacle to the JCWC providing on-going future support is lack of future funding to sustain a commitment to full-time professional staff, scientific tools, and transportation. Our goal is to develop a set of core schools (2 elementary, 2 middle, 2 high, 2 alternative and/or multi-age schools) within the Johnson Creek watershed where opportunities for environmental education and stewardship are available free of charge.

**Watershed Wide Event (WWE)* – Annually, the JCWC hosts the WWE at no less than 12 sites. Historically, the Lents area has served as one of the more active work party sites. Throughout the 54 sq. mi. watershed as many as 400 volunteers turn out to remove invasives, plant native species, and mulch previous plantings. Working through our Outreach Coordinator, the JCWC collaborates with many partners including neighborhood associations, schools, local governments, businesses, and regional public interest and civic groups. Tools, tool trailers and outreach materials are all needed to expand this popular event. JCWC will continue to provide the Lents area with an opportunity to connect to the Watershed Wide Event as well as other restoration and planting events throughout the year by working with Lents Springwater Habitat Restoration Project.

**JC 101* – This 2-part, 6 hour course, led by the JCWC Education Coordinator, is designed to increase knowledge about natural resources, fish and wildlife habitats, water quality, riparian habitat conditions and identification of plant species. Part 1 takes place in a classroom setting and includes an historic overview of the watershed, its functions and assets; Part 2 takes place in the field where participants are led by qualified professionals and conduct water quality and riparian habitat investigations, sampling for macroinvertebrates and identification of plant species. Both the cost of transportation, printing of materials, and availability of scientific tools has limited the ability to offer this popular course.

**Springwater Corridor Educational Signage* – This public awareness and education program develops and deploys permanent logo-watershed signage and interpretative signage along the Springwater Corridor. The goal is to raise the awareness and understanding of those that walk, ride and jog the corridor that they are in the Johnson Creek Watershed, and of its history, features, fish and wildlife, plants and water quality. Although the artwork for logo watershed signage is completed, lack of funding for finalizing designs, development and deployment of signage has prevented this program's expansion.

**Annual State of The Watershed Report* – This report features a scientific overview of the state of the health of the Johnson Creek watershed as well as provides a collection of vignettes about the people and their watershed- stories we have already begun to record and collect. The report would present both the tragedy of thoughtless actions along the creek and the power of restorative vision and commitment.

We believe our **Watershed of 10,000 Stewards** project will significantly and strategically build public involvement and support for the JCWC and its work, and measurably improve the community's perception of Thermo Fluids as a neighbor and corporate citizen. We have tied elements of the project directly to our Watershed Action Plan and Strategic Planning goals to focus on how we can deliver an effective EEOP program that is responsive to concerns generated by the Thermo Fluids spill as well as provide lasting benefits well into the future. For every dollar of Environmental Education funding received, the JCWC will leverage at least an additional \$5, making this a highly valuable investment.

Attachment B

Restoration of Fish Habitat on Errol Creek

A restoration project proposed
in lieu of a Natural Resource Damage Assessment
of the Thermo Fluids Oil/Acid Spill (March 15, 2004)

Prepared by
Johnson Creek Watershed Council
Contact: Michelle Bussard, Executive Director

and

Bureau of Environmental Services, City of Portland
Contact: Daniela Cargill, Johnson Creek Watershed Manager

Prepared for
Oregon Department of Fish and Wildlife

and

U.S. Fish and Wildlife Service

Presented to
William G. Newton, President
Thermo Fluids, Inc.

May 6, 2004

About Johnson Creek Watershed Council

The precursor to the Johnson Creek Watershed Council (JCWC), the Johnson Creek Corridor Committee (JCCC) was formed in 1989 as an outgrowth of public interest and government collaboration on the Johnson Creek Resources Management Plan. That same year, the Oregon Legislature created the Governor's Watershed Enhancement Board, now the Oregon Watershed Enhancement Board, to pursue a watershed health program based on the establishment of watershed councils whose mission is to form a common vision for the ecological and economic sustainability of their watersheds.

The *Johnson Creek Resources Management Plan* was published in 1995. It recommended the establishment of the Johnson Creek Watershed Council (JCWC) to develop collaborative, community-based solutions to key watershed issues: water quality degradation, frequent flooding, and loss or degradation of fish and wildlife habitat. The *Johnson Creek Resources Management Plan* formed the basis for extensive assessment and resource management planning in the years to come: in 2000, the Multnomah Progress Board published *Salmon Restoration in Johnson Creek*; in June 2001, the Bureau of Environmental Services produced the *Johnson Creek Restoration Plan*; and in 2003, the Johnson Creek Watershed Council completed the *Comprehensive Watershed Action Plan*.

Johnson Creek Watershed Background

The 54 sq. mi. area served by JCWC runs through 6 local jurisdictions and is comprised of 54 percent urban residential, 33 percent rural residential, 8 percent industrial and commercial and 5 percent parks and open-space. The number of jurisdictions, diverse land uses, and increasing pressure from urbanization in the watershed necessitate coordination between local governments, citizens, businesses and agencies to reach long-term goals for watershed health.

The Johnson Creek Watershed remains one of the only urban watersheds still host to historic salmon runs listed as threatened under the Endangered Species Act. As one of the last free flowing creeks in the Portland Metro Area, Johnson Creek is also one of the few places where recovery of salmonid populations is feasible in the city of Portland. In addition to salmon, Johnson Creek is also home to a number of important native fish species including lamprey, red-sided shiners, sculpin, speckled dace, and suckers.

While we may never be able to re-create pre-development conditions, the *Johnson Creek Restoration Plan and Watershed Action Plan* details restoration opportunities in no less than 58 distinct reaches of the main stem, nearly one-third of which are in the area impacted by the Thermo Fluids spill. We have identified the Errol Creek tributary located just upstream of Tideman Johnson Park as an appropriate restoration site. This high priority, core area is currently showing some, albeit limited use by salmon as spawning and rearing habitat.

The City of Portland has already committed significant financial resources to the Errol Creek project site. For example, the land available for the proposed restoration was purchased over the last four years with \$750,000 in City funds. Funding for the complete restoration of the creek's aquatic and riparian habitat is not currently available. The funds requested from Thermo Fluids will be used to continue the restoration effort on this site.

Project Overview

A key factor limiting salmonid survival in Johnson Creek is a lack of refuge and rearing areas, such as tributaries and backwater channels where fish can escape warm summertime water temperatures, high wintertime stream flows and other stressors. During the Thermo Fluids spill, an unusually high number of fish were observed at Crystal Springs, a tributary in lower Johnson Creek. Fish refuge areas such as Crystal Springs are limited in Johnson Creek due to fish barriers in tributaries and the limited connectivity of the creek to its floodplain. In particular, Errol Creek is currently inaccessible to fish due to the presence of the stone work in Johnson Creek installed as a Works Progress Administration project in the 1930's and two road culverts. Also, the creek was channelized to accommodate local roads and residential development, and as a result lacks the instream complexity essential for good fish habitat.

Errol Creek is located within the area impacted by the Thermo Fluids spill (see attached map). Our proposed project will improve summer and winter refugia for fish on a portion of this productive reach, and will provide important escape habitat for should future urban stressors impact water quality. Such a refuge was available and apparently used by local fish populations on the day of the spill at nearby Crystal Springs. Had a refuge on Errol Creek been available at the time of the Thermo Fluids spill, the number of fish killed along this reach may have been reduced.

The selected restoration site on Errol Creek is part of a larger complex known as Errol Heights, a spring-fed wetland habitat. The springs originating in Errol Heights supply an excellent source of cool ground water, making it an ideal location for summertime fish refuge. The riparian corridor is moderate to narrow in width and primarily vegetated with Oregon ash, red cedar, willow and black cottonwood. Invasive plants, however, grow near the creek and impervious surfaces frequently extend to the edge of the creek, thereby limiting the riparian corridor. The headwaters begin as springs near Thomas Park at SE 49th & Tenino Court where they feed a number of large wetlands before the creek flows through the neighborhood to its confluence with Johnson Creek at approximately SE Umatilla & 43rd Streets. The stream was heavily manipulated as the area was developed leaving a straight, channelized creek with little complexity or shade cover. It is not accessible to fish because of several impassable barriers. The project is highlighted by the Watershed Action Plan and the City of Portland Environmental Services as a top tier project. To date the project focus for the area has been on land acquisition and revegetation in the headwater wetlands area of this system. The area is now ready for more extensive restoration work to improve fish passage and instream habitat.

Key Goals of the Errol Creek Restoration Project

- ✱ Remove lower fish barrier and enhance fish habitat
- ✱ Reconnect and restore floodplain
- ✱ Protect and restore an important cold water tributary
- ✱ Increase in-stream complexity and sinuosity
- ✱ Provide outreach to property owners/encourage stream stewardship

Project Scope.

The goal of this project is to restore quality, accessible habitat for fish on the lower portion of Errol Creek (Sub-Area 1 on attached map). Work will begin at the mouth of Errol Creek where a fish barrier will be removed and 800 feet of stream will be re-meandered. Gravel will be added to the bottom of the stream to enhance spawning/rearing habitat. Large woody debris will be placed in the creek to create plunge pools and enhance cover habitat for fish. Once the stream channel is restored, the banks will be vegetated with native plants to provide additional cover for fish and decrease solar inputs to the creek. When completed, the project will provide outstanding fish habitat.

Preliminary assessment and design for the restoration project has already been completed. Further assessment on hydrology, channel connectivity and habitat and water quality are needed before completing final restoration plans and designs. Should Thermo Fluids agree to fund this project, permits could be applied for this winter for the 2005 July-August instream work window.

Public/media interest in the Thermo Fluids spill and restoration effort has been high. Therefore, public outreach will be an important component of this restoration project. A property owner initiative will ensure that project design and implementation is effectively communicated to local residents. All interested members of the community will be kept informed of the progress of the restoration effort. Public investment and citizen support is strong along Errol Creek making it an excellent site for the investment of restoration funds.

